UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE MATTER OF: Work-Product

DOCKET NUMBER: BC-2021-03374

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

He be given a medical retirement.

APPLICANT'S CONTENTIONS

He was medically separated and was denied continuation of service. He should have been medically retired for his physical (kidney disease, obstructive sleep apnea (OSA) and migraines) and mental health (Post-Traumatic Stress Disorder (PTSD) and depression) conditions because of hardship associated with these conditions.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a former Air Force staff sergeant (E-5).

On 17 Sep 06, his DD Form 214, *Certificate of Release or Discharge from Active Duty*, reflects the applicant was honorably discharged in the grade of staff sergeant (E-5) after serving 8 years, 9 months, and 23 days of active duty. He was discharged, with a narrative reason for separation of "Completion of Required Active Service." His reentry (RE) code is "4K," which denotes "Airman is pending evaluation by Medical Evaluation Board / Physical Evaluation Board."

For more information, see the excerpt of the applicant's record at Exhibit B and the advisories at Exhibits C, D, E, and H.

APPLICABLE AUTHORITY/GUIDANCE

On 3 Sep 14, the Secretary of Defense issued a memorandum providing guidance to the Military Department Boards for Correction of Military/Naval Records as they carefully consider each petition regarding discharge upgrade requests by veterans claiming PTSD. In addition, time limits to reconsider decisions will be liberally waived for applications covered by this guidance.

On 25 Aug 17, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued clarifying guidance to Discharge Review Boards and Boards for Correction of Military/Naval Records considering requests by veterans for modification of their discharges due in whole or in part to mental health conditions [PTSD, Traumatic Brain Injury (TBI), sexual assault, or sexual harassment]. Liberal consideration will be given to veterans petitioning for discharge relief when the application for relief is based in whole or in part on the aforementioned conditions.

Under Consideration of Mitigating Factors, it is noted that PTSD is not a likely cause of premeditated misconduct. Correction Boards will exercise caution in weighing evidence of mitigation in all cases of misconduct by carefully considering the likely causal relationship of symptoms to the misconduct. Liberal consideration does not mandate an upgrade. Relief may be appropriate, however, for minor misconduct commonly associated with the aforementioned mental health conditions and some significant misconduct sufficiently justified or outweighed by the facts and circumstances.

Boards are directed to consider the following main questions when assessing requests due to mental health conditions including PTSD, TBI, sexual assault, or sexual harassment:

a. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
b. Did that condition exist/experience occur during military service?
c. Does that condition or experience actually excuse or mitigate the discharge?
d. Does that condition or experience outweigh the discharge?

On 25 Jul 18, the Under Secretary of Defense for Personnel and Readiness (USD P&R) issued supplemental guidance to military corrections boards in determining whether relief is warranted based on equity, injustice, or clemency. These standards authorize the board to grant relief in order to ensure fundamental fairness. Clemency refers to relief specifically granted from a criminal sentence and is a part of the broad authority Boards have to ensure fundamental fairness. This guidance applies to more than clemency from sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. Each case will be assessed on its own merits. The relative weight of each principle and whether the principle supports relief in a particular case, are within the sound discretion of each Board. In determining whether to grant relief on the basis of equity, an injustice, or clemency grounds, the Board should refer to the supplemental guidance, paragraphs 6 and 7.

On 14 Apr 22, the Board staff provided the applicant a copy of the liberal consideration guidance (Exhibit G).

AIR FORCE EVALUATION

Due to the unavailability of the applicant's medical case files, AFPC/DPFDD does not make a recommendation but provides the follow for information purposes only. Under Title 10, USC, the Physical Evaluation Board (PEB) must determine whether an airman's medical condition renders

them unfit for continued military service relating to their office, grade, rank or rating. To be unfitting, the condition must be such that it alone precludes the member from fulfilling their military duties. The PEB then applies the rating best associated with the level of disability at the time of disability processing (*a snapshot in time*). That rating determines the final disposition (discharge with severance pay, placement on the temporary disability retired list, or permanent retirement) and is not subject to change after the service member has separated. According to data in the Military Personnel Delivery System (MilPDS), the Informal PEB determined the applicant's medical condition of Glomerulonephritis under the Department of Veterans Affairs (DVA) Schedule for Rating Disabilities (VASRD) Codes 7599-7536 not unfitting and he was returned to duty on 3 May 06. During the timeframe of his disability processing it was not uncommon for members with these types of kidney conditions to be returned to duty because in most cases the disease was not severe enough to impact their ability to perform normal military duties. The applicant also claims he should be medically retired due to OSA. However, there is nothing to suggest that this condition was severe enough to be considered unfitting and according to the data in the MilPDS, he was not boarded for this condition. Additionally, although he received a DVA rating for this condition, the PEB normally does not find this condition unfitting unless it is very severe or directly related to another unfitting condition. According to the DD Form 214 submitted by the applicant and contained in his personnel records he was separated under Separation Program Designator (SPD) code "KBK" which denotes "Completion of Required Active Service." The RE code of "4K" which denotes "Pending Medical/Physical Evaluation Board" is assigned during disability processing and bars a member from reenlistment during this processing but allows them to extend. It's noted that members are not normally separated under Reentry Code "4K" and that upon completion of the PEB, and after he was returned to duty, this reentry code should have been changed to a different code per AFI 36-2606, *Reenlistments and Extensions of Enlistment in the United States Air Force*. Furthermore, members who are found unfit by the PEB and who are disability retired or separated receive a RE code of "2Q" which denotes "Medically Retired or Discharged" which does bar reenlistment and extension.

The complete advisory opinion is at Exhibit C.

AFBCMR Medical Advisor recommends denying the application. The applicant is requesting to be medically retired due to conditions that were incurred while on active duty. There is no debate that both the kidney related condition as well as the OSA were incurred during active service time; Feb 05 and Jul 06, respectively. AFMAN 48-123, *Medical Examinations and Standards*, refers to both Medical Standards Directory (MSD) and DoDI 6130.03, *Medical Standards for Military Service: Retention*, Vol 2 for specific medical conditions that are disqualifying for continued military service. Although the MSD (line J20) denotes simple chronic glomer-ulonephritis or nephrotic syndrome as not being disqualified for retention, line J17 is much more descriptive, more accurate to this case, and is disqualifying for retention. For disqualification purposes, it states the following: "Nephritis, (a glomerular condition) chronic, with renal function impairment **or** when ongoing specialty follow-up more than annually is required." This case met such criteria as a disqualifying condition according to the MSD. Furthermore, and in accordance with DoDI 6130.03 Vol 2, both the kidney and OSA conditions are disqualifying for retention; section 5.15, paragraph (m) and section 5.27, paragraph (b), respectively. At first glance, these diagnoses represent disqualifying conditions for continued military service and therefore, being potentially

unfitting, an evaluation by the local Deployment Availability Working Group (DAWG) would be appropriate. However, under sections 5.15 and 5.27 of DoDI 6130.03 Vol 2, it clearly states the following: "When considering the conditions listed in this (these) paragraph(s), the condition must persist despite appropriate treatment and impair function to preclude satisfactory performance of required military duties of the Service member's office, grade, rank, or rating**."** In this particular case, none of the criteria listed above were in effect and therefore, under such parameters and according to the DoDI, his diagnoses would not actually support a disqualifying condition or that of an unfit condition. There was no evidence provided that he was ever placed on a duty limiting condition (DLC) profile, was never deem not worldwide qualified (WWQ) for duty, and no adverse statements by his chain of command were in evidence. Additionally, there was no evidence that either condition at the snapshot in time of service (near separation) interfered with his ability to reasonably perform his military duties in accordance to his rank, grade, office or rating. The applicant was able to satisfactorily complete his active service requirement, earning an honorable discharge and thus, provided more credence that he was able to continue to function at work. The Medical Advisor acknowledges he received a 60 percent and 50 percent DVA rating impairment for his disabilities, but a post-service DVA rating is not synonymous or equivalent to the military's disability evaluation at the time of service discharge; for the DoD can only offer compensation for those service incurred diseases or injuries which specifically rendered a member *unfit* for continued active service and were the cause for career termination as applicable under Title 10, U.S.C. The evidence in this case did not reveal any degree of unfitness nor was either condition the cause for career termination. By contrast, the DVA is authorized to offer compensation for any medical condition determined service incurred, *without regard to* a service member's retainability, fitness to serve, or the length of time since date of discharge.

The complete advisory opinion is at Exhibit D.

The AFRBA Psychological Advisor completed a review of all available records and finds insufficient evidence to support the applicant's request for the desired changes to his record. The applicant never received any mental health evaluation, diagnosis or treatment during service, and there was no evidence he experienced PTSD or depression during service. As a result, he was also never placed on a DLC profile for his mental health condition, was never deemed not WWQ due to his mental health condition, and no reports from his leadership of any suspected mental health condition that may interfere with his ability to reasonably perform his military duties in accordance to his office, grade, rank or rating. In fact, his Enlisted Performance Evaluations from the rating periods of 25 Nov 97 to 24 Jul 05 (seven total), all reflected exemplary performance with maximum ratings received. He was able to satisfactorily complete his service obligation and earned an honorable discharge. There was no evidence his mental health condition had elevated to potentially unfitting meeting criteria for a referral to the Medical Evaluation Board (MEB) and Disability Evaluation System (DES) for a possible medical retirement. The applicant did not receive mental health treatment until about 13 years post discharge from the DVA for stressors caused by his military duties and post service life. It appeared his symptoms had developed and exacerbated post service causing him to meet diagnostic criteria for PTSD and depressive disorder at a later time and requiring him to seek treatment. Therefore, the Psychological Advisor finds no error or injustice with his discharge.

For awareness, the military's DES, established to maintain a fit and vital fighting force, can by law, under Title 10, U.S.C., only offer compensation for those service incurred diseases or injuries which specifically rendered a member *unfit* for continued active service and were the cause for career termination; and then only for the degree of impairment present at the "snapshot" time of separation and not based on future progression of injury or illness. On the other hand, operating under a different set of laws (Title 38, U.S.C.), with a different purpose, the DVA is authorized to offer compensation for any medical condition determined service incurred, without regard to and independent of its demonstrated or proven impact upon a service member's retainability, fitness to serve, or the length of time since date of discharge. The DVA is also empowered to conduct periodic re-evaluations for the purpose of adjusting the disability rating awards (increase or decrease) over the lifetime of the veteran.

Liberal consideration is applied to the applicant's request due to the contention of a mental health condition. The following are responses to the four questions in the policy based on the available records for review:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
The applicant requests a medical retirement for PTSD and depression.

2. Did the condition exist or experience occur during military service?
There is no evidence his mental health condition of PTSD or depression had existed or was experienced during military service. He did not receive a diagnosis or treatment for any of these conditions until several years post discharge by the DVA.

3. Does the condition or experience excuse or mitigate the discharge?
Since there is no evidence his mental health condition to include PTSD or depression had existed during service, there is also no evidence either of these conditions had interfered with his functioning in the military necessitating a referral to the MEB for a possible medical discharge. He was never placed on a DLC profile or deemed not WWQ due to his mental health condition, and his condition would not excuse or mitigate his discharge.

4. Does the condition or experience outweigh the discharge?
Since his mental health condition to include PTSD and depression do not excuse or mitigate his discharge, they also do not outweigh his original discharge.

The complete advisory opinion is at Exhibit E.

AFPC/DP2SSM recommends the Board direct correction of the applicant's RE code. It is clear the applicant separated with the wrong RE code of 4K. If the Board does not grant the applicant's petition, AFPC/DP2SSM recommends administratively correcting the applicant's RE code to "1J" which denotes eligible to reenlist, but elects separation. Airmen selected under the Selective Retention Program [SRP] and elect separation are given RE code "1J." The applicant was pending MEB processing in Feb 06 and his RE code was updated to "4K" based on his pending MEB. Per AFPC/DPFDD's 16 Mar 22 advisory, the applicant was returned to duty on 3 May 06. His appropriate RE code should have been determined and updated in May 06 and then when he

decided to separate on his date of separation (DOS) of 17 Sep 06, the correct RE code would have been used on his DD Form 214.

The complete advisory opinion is at Exhibit H.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 14 Apr 22 and 10 May 22 for comment (Exhibits F and I), but has received no response.

FINDINGS AND CONCLUSION

1. The application was not timely filed.

2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, the Board concludes the applicant is not the victim of an error or injustice. The Board concurs with the rationale and recommendation of the offices of primary responsibility and finds a preponderance of the evidence does not substantiate the applicant's contentions. The mere existence of a medical diagnosis does not automatically determine unfitness and eligibility for a medical separation or retirement. The applicant's military duties were not degraded due to his medical conditions. A Service member shall be considered unfit when the evidence establishes that the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating. Furthermore, liberal consideration was applied to the applicant's request due to the contention of a mental health condition, however, since there is no evidence his condition had interfered with his functioning in the military necessitating a referral to the MEB for a possible medical discharge, his condition or experience does not excuse, mitigate, or outweigh his discharge. The Board also notes the applicant did not file the application within three years of discovering the alleged error or injustice, as required by Section 1552 of Title 10, United States Code, and Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*. The Board does not find it in the interest of justice to waive the three-year filing requirement. Therefore, the Board finds the application untimely and recommends against correcting the applicant's records. However, the applicant's record will be administratively corrected to reflect a RE code of "1J" which denotes eligible to reenlist, but elects separation.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

RECOMMENDATION

The Board recommends informing the applicant the application was not timely filed; it would not be in the interest of justice to excuse the delay; and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

CERTIFICATION

The following quorum of the Board, as defined in Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2021-03374 in Executive Session on 22 Jun 22:

Work-Product, Panel Chair
Work-Product, Panel Member
Work-Product, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 7 Sep 21.
Exhibit B: Documentary evidence, including relevant excerpts from official records.
Exhibit C: Advisory Opinion, AFPC/DPFDD, w/atchs, dated 16 Mar 22.
Exhibit D: Advisory Opinion, AFBCMR Medical Advisor, dated 29 Mar 22.
Exhibit E: Advisory Opinion, AFRBA Psychological Advisor, dated 5 Apr 22.
Exhibit F: Notification of Advisory, SAF/MRBC to Applicant, dated 14 Apr 22.
Exhibit G: Letter, SAF/MRBC (Liberal Consideration Guidance), dated 14 Apr 22.
Exhibit H: Advisory Opinion, AFPC/DP2SSM, dated 3 May 22.
Exhibit I: Notification of Advisory, SAF/MRBC to Applicant, dated 10 May 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

3/20/2023

Work-Product

Board Operations Manager, AFBCMR
Signed by: USAF